No. 2458

In the

United States Circuit Court of Appeals

For the Ninth Circuit

Thomas & Mersey Marine Insurance Company, Ltd. (a corporation),

Appellant,

vs.

Pacific Canning Company (a corporation),

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee.

APPELLANT'S REPLY BRIEF.

CONSTRUCTION OF F. P. A. CLAUSE (Appellee's Brief, 10-13).

Appellee seems to lay great stress on the fact that both Judge Hanford on exceptions and Judge Neterer on the trial took the view contended for by it, and says that these two decisions are *"entitled to great weight"*. We have already shown, as to Judge Hanford's decision, that it was rendered upon the exaggerated statements of the libel as to the extent of the fire, namely: that *"the bulkhead forward of the lazarette, the door thereof, and a considerable portion of dunnage and other parts"* of the ship were burned (Libel, Record, 5); and the decision expressly refers to the *bulkhead* as being a part of the ship burned (Record, 322). As

to Judge Neterer's decision, it is clearly erroneous because it holds that the *allegations of the fire's extent, as shown by the mate's log, are "sustained by the evidence"* (Record, 326), the said log reciting that the *"bulkhead, together with the door thereof, * * * were burned"* (Id., 326-327). Furthermore, Judge Neterer's decision is based upon an erroneous conception as to what is shown by the evidence as being the result of the Glenlivet decision, the court saying: *"After this case was decided the words 'on fire' were substituted for the word 'burned'."* The only evidence in the case touching this matter is that of Mr. Beckett, who testifies that *" 'Burned' has not been left out of the clause but 'on fire' has been added"* (Record, 232). And Gow confirms Mr. Beckett's statement when he says: *"Since the issue of the decision some slips have had the words 'on fire' added to 'burnt' "* (Gow, 181).

We submit that the construction may well be different where, instead of an *addition* to the word 'burnt', there is before the court a clause with no showing that any part of it was intended to supplement anything. The situation calls solely for a construction of the clause reading: *"stranded, sunk or on fire"*, and in support of our contention as to its meaning we invoke the principle upon which the clause *"stranded, sunk or burnt"* was construed.

Judge Neterer's reference, by way of comparison, to the memorandum in the body of the policy reading: *"sunk or burnt"*, and the slip reading: *"sunk or on fire"*, to the effect that the use of both expressions clearly evidences a purpose in the minds of the parties

to make a distinguishment is far from convincing. In fact, if the word "*burnt*" is given, as in the Glenlivet case, a meaning which excludes the idea of *total* destruction, then the two expressions are entirely harmonious in their meaning; while on the other hand, if the principle of a substantial burning of the ship as a whole is applied to the exception in the memorandum and discarded as to the slip, the contract becomes inharmonious and ambiguous. Such a construction should be avoided if possible.

Assuming, as stated by counsel, that the form of the policy is furnished by the insurance company, and that it is drawn to evidence the intention of the parties (Brief, 14), we submit that the proper and only conclusion arising from the construction of the contract as a whole is, that the two exceptions,—"burnt" and "on fire",—were used with the intention that they should harmonize, and not that they should be read so as to be applicable to radically different sets of facts. From the underwriters' view there can be no escape from the proposition that harmony and not conflict was the intention. In view of the known construction of the former expression, it is inconceivable that the company, in framing the wording of the slip, should have deliberately so framed it as to make it ambiguous. No one, having in mind the Glenlivet decision, could say that, in the use by the company of the words of the slip, it was intended to destroy or disturb the favorable construction which had been given to the analogous subject matter expressed in the use of the word "*burnt*". Had such been the intention,

the ease with which it could have been shown is potent evidence of the contention that the framer of the slip had adopted the narrow meaning of the word *"burnt"*, and had expressed such meaning by using the analogous words *"on fire"*.

We submit that the statement of counsel that the use of the words *"on fire"* was intended to reinstate a situation which existed before the Glenlivet decision (Brief, 21), has no basis in fact, and to say that it has, is no more proper than for us to state that many policies *before* the Glenlivet decision used the words *"on fire"* and not *"burnt"*,—a statement which can be verified we believe by an inspection of some of the old forms.

As to Mr. Beckett's testimony that the burning of the bulkhead door, in his opinion, would open the warranty (Brief, 23), we submit that counsel need not stop there. According to *this* witness any structural part of the ship burned would delete the warranty, however trivial or to whatever extent the ship had been on fire. Furthermore, Mr. Beckett's testimony all applies to the warranty reading: *"stranded, sunk, burnt, on fire or in collision"*.

It is said that in the Glenlivet case *"no part of the fabric or structure of the ship itself was 'burnt' or 'on fire'"* (Brief, 24). (Note the analogous use made by counsel of the two expressions.) In this counsel is mistaken. Lindley, L. J., says:

> "* * * the fire was so severe that some damage was done to the structure of the ship; it

> is unnecessary to particularize it, * * * but it is sufficient to say that the fire clearly injured the ship''.
>
> *7 Asp.* (N. S.) 295.

Again, Smith, L. J., says of the fire:

> ''An angle iron buckled down and the wood casing was destroyed''.
>
> (Id., 396).

Again, in the statement of the facts preceding the trial court's decision, we find:

> ''There was some damage to the ship's plating, brick and wood casing and hatches''.
>
> (Id., 342).

Counsel says that Bouvier defines the words *''on fire''* as the *''effect of combustion''* (Brief, 30). This is precisely the definition which makes those words synonymous to the expression *''burnt''*.

Again, counsel says at p. 32 of brief, that the opinion of Mr. Walton, referred to at p. 31 of brief, clearly shows that the word *''on fire''* were substituted for the word *''burnt'' after* the Glenlivet decision. In this, we submit, counsel is in error, for in the opinion referred to, the expression *on fire,* is used within quotation marks, thereby showing that some policies *before* the Glenlivet decision contained the expression *''on fire''*, although the policy submitted to Mr. Walton contained the expression ''burnt''. Mr. Walton's opinion was directed solely to the question of whether the warranty was opened or not in the case of ship's stores being burnt, and he was of the opinion that, whether the expression was *''on fire''* or *''burnt''*, the combustion must be of some part of the fabric of the ship.

FACTS AS TO THE "SARDHANA'S" FIRE.

Under this head the decision of Judge Hanford on exceptions is quoted as showing that the words *"on fire" "are indicative of a happening whereby a ship is endangered by actual burning some part of it * * * A fire in that part of a ship* (bulkhead between decks) * * * *if not promptly subdued, would certainly be destructive and such a happening would be truthfully described by saying the ship was 'on fire'"* (Brief, 34). This test, we submit, is as equally applicable to the expression *"burnt"* as *"on fire"*, and yet in the Glenlivet case it was expressly rejected, Smith, L. J., saying:

> "Now I come to the suggestion of Mr. Aspinall that it (burnt) means the initiation of such a fire that, unless it were put out, it would consume the ship. I cannot think that can be the meaning of this for there never could be a fire which, if not put out, might not consume the ship."
>
> *7 Asp.* (N. S.) 396.

Counsel is not accurate, therefore, in his contention that Judge Hanford's test is not contrary to the law of the Glenlivet case, for we submit that it is in direct contradiction of it.

The only remaining matter under this head which requires further answer relates to the contention that the entries of the ship's log are governed by the English Merchants Shipping Act of 1894 (Brief, 38). Counsel again falls into error in supposing that the log in question is the *official* log required by this act. Usually there are on British ships a log kept by the mate, sometimes called the mate's log, and the official log required

by the Act referred to. The former is a diary of the ship's voyage, while the latter is in the form issued by the Board of Trade, in which certain matters must be entered as provided by section 240 and other sections of the act. These matters are convictions of offenses by the crew, illness or injury of the crew, marriages, births, deaths, names of seamen employed and discharged, wages and collisions with other ships, the amount of freeboard and various other matters of a similar character. These are the things which by section 240 of the act are made admissible as evidence. The mate's log, which contains a statement of the fire on the "Sardhana", is not an official log, and the entries found in it are not evidence of the facts enumerated, nor are they admissible against this appellant. The only office of which they are susceptible would be as an impeachment of the evidence of the witnesses signing the same and, if used for such purpose, are subject to rules applicable to the impeachment of witnesses. Both Wallace and Wylie admitted they signed the log, and that ends the matter. Under the sanction of a judicial oath their evidence was taken, and that evidence alone is the court's guide in this case. The facts set forth in the mate's log are not such as are required by the British Act and, therefore, are not evidence against the appellant of the facts contained therein on any theory known to us, and a fortiori, the protest, admittedly copied from the log, is not evidence against appellant of the facts stated in it.

Counsel suggests that the log is admissible in rebuttal of the master's and mate's testimony (Brief, 44). Here

again counsel is in error, for if it be admissible at all to establish the facts it contains, it is admissible for all purposes. But as we have said, its only legal use would be, not to establish the truth of the facts it contains, but to impeach or discredit the testimony of Wallace and Wylie, and, when used for such purpose, certain well known requisites must be complied with, which it is sufficient to say were not complied with here, even though it were admitted that there is any material *unexplained* difference between the log entries and the testimony. Of course, it is perfectly clear that the entries in the protest were made from the mate's log, for Capt. Wallace testifies that the appellee asked him for the *"mate's log book"* and he gave it to them (Record, 116).

Reference is also made to Mr. Walker's report of survey of this fire (Brief, 44), which report, upon examination and comparison, will be found to be a copy of the entry of the log. Of course, this ex parte report is not evidence, and yet we submit that it was from the facts enumerated in this survey report that the witness Walker testified (Opening Brief, 28). Much is said of the excitement and the precautionary measures taken on the occasion of the fire, but such matters are not necessarily evidence of the fire's extent, but in this case simply show the caution used to prevent what might have been a serious conflagration (see Record, 159-160).

Superintendent F. D. Beal's testimony with reference to the extent of the fire, illustrated by his diagram (Record, 96), has already received attention (Opening Brief, 30).

We admit that it is immaterial whether repairs were made or not (Brief, 55), but the fact that no repairs were considered *necessary* by the interested owners, has some bearing upon the question of the fire's extent.

SUE AND LABOR EXPENSES.

Under this head there are several matters to which brief replies should be made:

1. It is said that the lighter which capsized was but partially loaded, and that in accordance with custom it was left moored alongside the "Sardhana" for the purpose of completing the loading *"the following day"* (Brief, 57). This statement, which bears on the question of appellee's negligence, is not sustained by the record. Preece, the boss stevedore who loaded the barge, says it was completely loaded:

> Q. Was the barge completely loaded or not?
> A. Just finished.
> Q. Completely loaded? A. Yes.
> Record, 278.

Furthermore, this witness says it was the custom of the creosote people to tow these lighters when loaded away from the "Sardhana", but that in this particular instance it was not done (Id., 279). This evidence also meets appellee's claim (Brief, pp. 102-103) that the drums discharged before the fire were presumably still in the lighters and therefore still at risk. No such presumption can be indulged in and, moreover, the drums, even if still in lighters, were covered by a "separate insurance."

2. Counsel refers to the evidence of Superintendent Beal (Record, 69), as showing that the particular lighter in question was examined on the night she capsized *"after she had been fully loaded"* (a statement inconsistent with the contention that it was *not* fully loaded), and found to be all right (Brief, 60). This testimony of Mr. Beal's (Record, 70) will be seen to refer to an examination generally of the lighters made *before sending them out* to be loaded, and not an examination made after they were loaded. This evidence is further referred to as showing *"conclusively that the lighter was seaworthy at the time it was put into use"* (Brief, 60). Beal simply says that every night before sending the scows out they were sounded, and that, although there is always some water in them, there was not enough to be considered dangerous *"if she had remained as she was"* (Record, 70), but additional water got in during the night (Id., 71), and, in his opinion, that would be the only means of capsizing the lighter (Id., 80).

3. Counsel next says that *"it is possible that this lighter did sink or capsize because of water in it"*, and then makes the contention that the water did not come through open seams but through open hatches (Brief, 61-62). Although no one knows whether the water came in through the sides or from the top, it obviously makes no difference on the question of the lighter's fitness or seaworthiness. If her hatches permitted of water passing down into her hold, so as to list her and cause capsizing, the lighter was just as unseaworthy as if the water came in through her seams and accomplished the same result.

4. It is next said that if the appellee had furnished the lighters there might have been some ground for our contention of an implied warranty of seaworthiness (Brief, 64), but the facts show, however, that "*appellant*" (appellee) did not own or furnish the lighters (Brief, 64), but that they were furnished by the Washington Stevedoring Co. (Id., 65). It is true that the lighters were not *owned* by the appellee, and were *furnished* by the Washington Stevedoring Co., and that the master of the "Sardhana" superintended the discharge of his ship into them; but the situation cannot be thus technically met. *Who furnished the Washington Stevedoring Co.?* Surely not the owners of the ship, for their liability ceased at the ship's tackles. Surely not the Thames & Mersey Marine Insurance Co. It is futile for appellee to avoid responsibility on this point. The use of these lighters was for appellee's benefit; the appellee inspected them at night before sending them out (Record, 70); when they were loaded the appellee towed them away (Id., 279), and when this particular scow capsized it was appellee's surveyor who surveyed it for the purpose of ascertaining its condition.

Under these circumstances, the liability as matter of law rests upon the appellee.

EXTENT AND CAUSE OF LOSS (Brief, 71).

Pages 71 to 78, inclusive, are devoted by counsel to a statement tending to show a short delivery of 56,267.2 gallons of loose creosote. Even assuming the truth of

every fact stated, there is still to be shown a loss of creosote through a peril insured against. Such loss has not been shown, for *"short delivery"* is not one of the enumerated perils of the policy. If it had been, we hardly think the insurer would have been satisfied with an ex parte measurement of the drums' contents either at the port of shipment or the port of discharge. On the other hand, all the facts of the case negative the *necessary* claim of a loss through a peril insured against,—the "Sardhana" was seaworthy, did not leak, no creosote was pumped overboard and all loose creosote was delivered. The trial court did not seem to think it necessary, however, that it be shown that the creosote loss was occasioned by a peril insured against, for it says:

> "The ship Sardhana being seaworthy when she left London, the cargo in good order and condition when received by the ship, the damage to the drums being external, and it conclusively appearing that there was a loss of cargo, the libelant is entitled to recover his damage."
>
> (Record, 331).

Counsel characterizes the evidence of Capt. Wallace, Mate Wylie and Apprentice Yeaton to the effect that the "Sardhana" did not leak and took no water during the voyage as negative testimony (Brief, 80), and, in impeachment of Capt. Wallace, quotes testimony he is said to have admitted giving in the case of the "Jupiter", where he says the *"Sardhana"* took in a lot of water on deck at times (Brief, 81). Counsel says that, in view of this admitted fact that the *"Sardhana"* took considerable water, it is inconceivable that the

pumps were not used once on the voyage as testified to by both Wylie and Yeaton (Brief, 82), and that the log entries: *"Pumps, lights, and lookout carefully attended to"* are significant.

This court will clearly see that counsel is led into error when he assumes that, because a vessel ships water during rough weather, it follows that water passes into the hold, and as a consequence the pumps are used to get rid of it. Neither the deck nor hatches of a seaworthy ship permit of water passing into the hold, and it is a common occurrence, known to all seamen, to have a ship take water on her decks in rough weather. Such is always to be expected, even of seaworthy vessels, but water so taken on board a seaworthy ship does not pass into the hold, nor does it necessitate the use of the pumps.

For counsel to refer to the finding of the court, in the case of the *"Jupiter"*, that *"most of the spillage was pumped out of the ship and wasted"* (Brief, 85), in support of a similar contention in this case, where the proof is that *none* of the *"spillage"* was pumped out of the ship or wasted, is, we submit, improper. We are not familiar with the evidence given in the case of the *"Jupiter"*, but, if the court made the finding referred to, there must have been proper evidence to support it; whereas, in the case at bar, the evidence is the other way.

Appellee's witness, Walker, it is true, when asked what became of the 56,267.2 gallons of missing creosote, says:

> "I don't know. All I can tell you is what the crew told me, that it was pumped overboard."
>
> (Record, 217).

But, of course, this hearsay of the witness will be given no consideration.

Appellee's excuse for not libelling the *"Sardhana"* for this claimed shortage of creosote, which nobody can account for, is that because of the wording of the charter party consignee was compelled to pay freight on the number of drums delivered, irrespective of their condition or contents (Brief, 85). What that situation has to do with a claim for short delivery against the ship, we are at a loss to understand. Counsel refers to appellee's inability to prove directly that the creosote was pumped overboard as arising through the antagonistic attitude of the mate and master of the *"Sardhana"*. This is a remarkable contention. The evidence of both these witnesses was taken by written interrogatories, not one of which, propounded by the appellee, was directed towards the ascertainment of the fact of creosote being pumped overboard. And we submit furthermore that the answers to all of appellee's cross-interrogatories are fairly made, and show no trace of an antagonistic attitude towards the appellee. We presume that the *dispute* between the appellee and the ship, referred to by counsel in this connection (Brief, 85), is supposed to find support in the following testimony of H. E. Stevens, appellee's bookkeeper:

> Q. Mr. Stevens, state if you know whether any claim was made against the ship for shortage, short delivery of this shipment.
>
> A. We protested against payment of freight, but the charter party was made out and the number of drums being delivered, that we were to pay on the number of drums delivered. We were compelled to pay the freight.
>
> (Record, 170).

We know of no other evidence on the subject that counsel could point to, and we submit that if the foregoing is all, then to claim that it establishes a *dispute* is preposterous.

At p. 86 of the brief we call the court's further attention to the assertion there made that the burden is on the appellant to prove that there was no loss of creosote. We deny any such obligation, and assert that, not only is the burden on the appellee to show clearly that there was a loss, but also, what is more to the point, a loss arising through a peril insured against.

As to the damaged drums, and counsel's criticism of appellant for its failure to produce the tally sheet of the witness Wylie (Brief, 86-87), we have already referred to this matter in our opening brief as being one of the results of this delayed litigation (Opening Brief, 80). Wylie doubtless tallied the cargo so as to check up the bills of lading. Finding no claim was made against the ship for shortage, his tally sheets would have no further value. But counsel further says that *"if this tally (Wylie's) varied from appellee's, why did not appellant produce the custom house tally?"* (Brief, 87). The reason that appellant did not produce this tally is that there is no evidence of its existence, and moreover we venture the opinion that, though the tally of the customs authorities had been available, it would not necessarily have shown the number of damaged drums, for that the drums may have been dented was of no concern on the question of duty to be paid. Furthermore, as the burden of proving the number of drums damaged was on the appellee, and

as it produced *no tally sheet of its own* in support of this burden, we assume that, had the proof been available from the customs authorities, appellee would have seen to its production. While appellee has probably shown damage to creosote containers, caused by perils insured against, it fails utterly to answer our contention that, as the evidence shows a loss or damage before the vessel encountered any of the perils insured against, as well as a loss or damage from such perils, the burden is on it to show the quantum of loss for which appellant is liable.

As to counsel's attempted answer to the contention that the F. P. A. warranty is only opened as to goods on board at the time of the fire, we submit that it fails. We do not controvert the principle of law that the happening of the excepted event deletes the warranty, even as to damage caused by some other peril. What we do contend, however, is that the goods must be at risk on board the ship, or craft, at the time of the happening of the excepted event, and as to loss or damage to goods not so on board the warranty is not opened. This is clearly the law, as shown by the cases cited by us. In attempting to meet this legal situation, however, counsel contends that none of the damaged drums had been discharged from the ship before the fire, and bases such contention on the inference that all the damaged drums must have been in the hold of the vessel, and that the discharge of the first two days preceding the fire must have been from the between decks, where there was no damage. This is an unwarranted inference. No evidence is cited to directly sustain this

view, and the inference is drawn from certain entries in the mate's log. Let us briefly look into this matter.

It will be noted that the boss stevedore, Preece, says that the *'tween deck* cargo adjacent to the bulkhead, where the fire occurred, had not been discharged at the time of the fire (Record, 282). Furthermore, the "Sardhana" had but one clear hold, but with 'tween deck beams seven feet below the main deck, on which beams, around the ship's sides, are laid a deck four or five feet wide on which cargo was stowed. The lazarette communicates with the hold through the sliding door that was on fire, and when the drums shifted at sea the hold was entered through the sliding door (Record, 161). This description of the ship by Capt. Wallace destroys the inference made by counsel from the log entries, for clearly, when the use is made in the log of the word *"hold"*, there was no purpose to distinguish between the hold and the 'tween decks. When the drums were chocked off at sea the sliding door remained open, *"it being jammed by the creosote drums"* (Id.). This jamming of the drums was *between decks,* and clearly shows that the entry of September 4th in the log: *"The drums were found to be adrift and were rolling about in all directions"*, alludes to the 'tween deck cargo as well as to the hold.

Furthermore, Capt. Wallace testifies that there were damaged drums among the 427 discharged prior to the fire, for he says:

> "At the time of the fire we had discharged 427 drums, some of which were no doubt slightly damaged."
>
> (Id., 162).

This shows that there were damaged drums discharged *before* the fire and, if appellee has failed to prove the exact number of them, it follows that it has also failed to show the number remaining at risk on board at the time of the fire.

Reference is made to the testimony of Mr. Beal (Brief, 119) to meet our suggestion that the loss of creosote probably resulted from appellee's delay in measuring it (Opening Brief, 71). Despite Mr. Beal's testimony that the damaged drums were not left in the yards of appellee, but such as leaked were dumped at once (Record, 91); we contend that the record abounds with proof that this statement is not accurate. In the first place, there is no proof showing a separate measurement of leaking or damaged drums from undamaged ones. If the two classes of drums had been separately measured, there would certainly have remained some evidence showing the quantity measured from the damaged drums. Beal was expressly questioned on this matter:

> Q. Do your records there show the dates this creosote from the damaged drums were dumped and measured?
>
> A. No.
>
> Q. You testified they were dumped somewhere from the latter part of November to the 8th of March; do you know upon what dates during that period they were dumped?
>
> A. No, I could not tell from this record. These notations just show that they were dumped between those dates.
>
> (Record, 91).

The record is clear that all of the claimed 741 drums were so damaged as to be unmerchantable (Barnaby,

224), and, if so, they must all have been leaking, for a dent without a leak would certainly not make the drums unmerchantable. Walker's survey report shows that every one of the damaged drums leaked (Record, 22). Barnaby says: *"I don't think that there were any that I saw more than half full"* (Record, 225).

If there was a shortage of 56,267.2 gallons, then, as each drum contained about 109 gallons, there must have been such a leakage as would empty 515 full drums. However, the principle remains the same, no matter whether they were damaged or undamaged drums which were left from November to March unmeasured. No one knows what happened to the contents of even full drums left unmeasured in appellee's yard during such a length of time. The matter is not of special importance, and was only referred to by us by way of suggesting a reason for the shortage.

In the case of the *"Jupiter"*, where the shortage was 51,321 imperial gallons, approximating very closely 56,267.2 U. S. gallons, the *reason* for the shortage appears while, in the case at bar, there is an entire absence of evidence showing a shortage through a peril insured against.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

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